Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

# 82-309

No.

## Supreme Court of the United States

IN THE

OCTOBER TERM, 1982

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MARY K. SMITH, HELEN FOLEY,
and JOSEPH SHANAHAN
*Appellants,*

vs.

S. DAVID BRANDT
~~P. PAUL RICCI~~, President
STATE BOARD OF EDUCATION
and FRED G. BURKE,
Commissioner of Education,
*Respondents*

---

**ON APPEAL FROM THE NEW JERSEY SUPREME COURT**

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**JURISDICTIONAL STATEMENT**

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Date: 20 August, 1982

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The Superior Appellate Printing Company, Cranbury, NJ 08512

## QUESTIONS PRESENTED

1. Is the inclusion of an excusal period on grounds of conscience in a state regulation mandating a Family Life Education program dispositive of appellants' claim of indirect coercion by the state as inhibiting the free exercise of religion thereof?

2. Did the Supreme Court of New Jersey err in holding that the action of the Board of Education in adopting the regulation does not violate the Due Process Clause of the Fourteenth Amendment?

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---

**ON APPEAL FROM THE NEW JERSEY SUPREME COURT**

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## JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the New Jersey Supreme Court dated 25 May, 1982 and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW

The decision of the Supreme Court of New Jersey appears in the Appendix hereto at Appendix A. (89 *N.J.* 514)

## JURISDICTION

This is an appeal from a regulation of the New Jersey State Board of Education, mandating a family life education program (sex education) into the state curriculum (*N.J.A.C.* 6:29-7.1), as violative of the First and Fourteenth Amendment to the United States Constitution which relief sought was denied by the New Jersey Supreme Court. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by U.S.C. Sec. 1257 (2). The following decisions sustain such jurisdiction to review: *Largent v. Texas*, 318 *U.S.* 418, 63 S. Ct. 667, 87 L.Ed. 873; (1942) *Lawrence v. State Tax Commission*, 287 *U.S.* 276, 282,3, 52 S. Ct. 556, 76 L.Ed. 1102; (1931) *Hamilton v. University of California*, 293 *U.S.* 245 79 L.Ed. 343, 55 S. Ct. 197 (1934.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Fourteenth Amendment, United States Constitution:

> "1. . . . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

*N.J.A.C.* 6:29-7.1 which is the subject regulation appears in the Appendix hereto at Appendix B.

*N.J.S.A.* 18A:38-25 and 31 appear in the Appendix hereto at Appendix C and D.

*N.J.S.A.* 52:14B-4(2) appears in the Appendix hereto at Appendix G.

## STATEMENT OF THE CASE

This is an appeal from the final adoption of revised rules governing Family Life Education by the New Jersey State Board of Education (hereinafter referred to as State Board) at its August 6, 1980 meeting. The appeal was certified directly to the Supreme Court of New Jersey on respondents' motion whereat decision was granted for respondents on May 25, 1982.

The matter stems from earlier action by the State Board when in 1967 it adopted a policy on sex education which recommended but did not require that each local board of education include a sex education program in its curriculum. In January, 1979, the State Board appointed a committee of its membership to restudy the problem. Upon completing its review, the committee submitted its report to the full membership at its August 8, 1979 meeting. Their recommendations were that: (See Appendix E).

1.) the study of family life education be required as part of the health curriculum.

2.) the state regulations provide for an excusal period for sex education portion when based on parental grounds of conscience.

3.) districts provide appropriate services to assist pregnant teenagers and teenage parents.

4.) the Department of Education prepare, for consideration by the State Board, regulatory proposals to implement the Committee's recommendations.

The State Board unanimously accepted the committee's report and specifically adopted each of the recommendations at that meeting.* On February 6, 1980 the first public hearing on the above regulation was held by the State Board and on March 6, 1980 such proposed rules were published in New Jersey Register. On April 8, 1980, June 11, 1980 and on August 6, 1980 other public hearings were held on revisions to these rules. The revisions were adopted and an official copy of them was filed with the Office of Administrative Law, Division of Administrative Procedure on August 7, 1980 calling for the implementation of the program to be completed by September, 1983.

---

*At page 3 of respondents' brief in the State Court it states: (. . . at its August 8, 1979 meeting) "The State Board unanimously accepted the Commissioner's report and specifically adopted each of its recommendations."

Appellants are citizens and taxpayers of the State of New Jersey who presented written statements in opposition to the above regulations and revisions and then filed an appeal in the Superior Court, Appellate Division, charging that the regulation violated individual constitutional rights guaranteed under the First and Fourteenth Amendments and also certain procedural requirements under the State Administrative Procedure Act.

## RAISING THE FEDERAL QUESTION

At the earliest stage possible, in the appeal to the Appellate Division, appellants raised the claim that the rules as adopted by the State Board of Education violated the "Establishment of Religion" and "Free Exercise" Clauses of the First Amendment as well as the "Due Process" clause of the Fourteenth Amendment. The Supreme Court of New Jersey affirmed the action of the State Board of Education and denied those claims.

## THE QUESTIONS ARE SUBSTANTIAL

The basic substantive issue involved in this appeal is of great public interest having to do with State mandating of sex education programs over citizen objections of their coercive effect on the "Free Exercise of Religion" and is similar to ones raised and settled in several States on the basis of having included in the regulations excusal clauses for reasons of conscience. The instant decision cites decisions of the Supreme Court of Hawaii [*Madeiros v. Kiyosaki*, 52 *Ha* 436, 478 P 2d 3124 (1970)] and California Court of Appeals [*Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Ct App. 1975), 2 appeal dism. 425 *U.S.* 908], as reason for rejecting appellants' argument that the excusal period furnished no defense to a claim of unconstitutionality under the First Amendment. Thus, it is clear that State Courts of the highest level are setting a precedent on this federal question of great public importance which appellants contend is erroneous and should be settled at the highest federal level.

In support of this appellants present the following propositions:

## ARGUMENT

### POINT ONE

**THE SUPREME COURT OF NEW JERSEY ERRED IN HOLDING THAT, BECAUSE OF THE EXCUSAL CLAUSE, THE REGULATION OF THE STATE BOARD OF EDUCATION DOES NOT VIOLATE THE FREE EXERCISE OF RELIGION CLAUSE OF THE FIRST AMENDMENT.**

The holding of the New Jersey Supreme Court is as follows:

> "Thus, appellants' argument based on the Free Exercise Clause is flawed in two ways: *First*, the regulation, because of the excusal clause, does not inhibit the free exercise of religion. *Second*, to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause."

Appellants' argument in opposition to this conclusion is:

A. *As to the First Point of the holding:*

The First Amendment to the United States Constitution states in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

and in *Cantwell v. Connecticut*, 310 *U.S.* 296, 84 L.Ed. 1213, 60 S. Ct. 900 (1940), it states at 303:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws . . ."

thereby making First Amendment prohibitions applicable to state legislative actions.

The New Jersey State Board of Education adopted the provisions of the Family Life Education Program (N.J.A.C. 6:29-7.1) which were filed and made effective on April 17, 1980 with amendments becoming effective on August 7, 1980. (Appendix B) Attendance at such courses is mandated for children of school age (N.J.S.A. 18A:38-25) with sanctions on parents who fail to comply with above statute. (N.J.S.A. 18A:38-31) (Appendix C-D)

In his opening statement at the first hearing on the Family Life Education Program (N.J.A.C. 6:29-7.1) on February 6, 1980 Commissioner of Education Fred G. Burke stated: (Appendix F)

> "You have before you a proposal for Administrative Code that requires family life programs in all school districts.
>
> In January of last year the Board formed its committee on this issue. In August the committee released its report. *These rules are based on the recommendations of the committee."*
>
> (emphasis added)

The basis and guiding rationale for this regulation is to be found in the recommendations of the five member committee of the New Jersey Board of Education as listed in the "Report of the Family Life Committee of the New Jersey State Board of Education" which recommendations were adopted by the Board at its August 6, 1979 meeting (Appendix E) and are listed at (A18a).

Appellants contend that the most objectionable parts of the program is embodied in that particular phrase listed in the recommendations as, ". . . to discuss the advantages and disadvantages of becoming sexually active at an early age and . . .". (A18a) which subject matter, being of scandalous behavior on its face, is not discussionable at all from appellants' moral viewpoint because it represents a violation of the Ten Commandments (Commandment on adultery) which is central to the beliefs of the Judeo-Christian religious community and is of such common knowledge by all that judicial notice may be taken of it pursuant to Federal Rule 201 (d). In effect, by such mandate,

State power is operating against the student with such religious belief by coercing him or her into a situation which could be an occasion for sin.

Appellants further contend that, basically, their argument on this point is supported by the Yoder case. (*Wisconsin v. Yoder*, 406 *U.S.* 205, 92 S. Ct. 1526, 32 L.Ed. 2d 15 (1972). This was a similar case under the Free Exercise Clause involving the right of members of the Amish religion to refuse to send their children to school after completing the eighth grade in the face of a state compulsory school attendance law requiring such attendance to age sixteen. The Amish position was that formal high school education beyond the eighth grade was contrary to their beliefs, while the State's was that the child must be protected from ignorance fostered by the parent.

The Court held at 214:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, . . .
>
> . . . . . .
>
> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

Appellants maintain that their position is stronger than that of respondents in the Yoder case, supra, wherein the Court sustained the claim that attendance at a routine secular curriculum containing no religious connotations in itself interfered with their religious beliefs. In the instant case the mandated subject matter, as portrayed in the above recommendations is on the face of it flagrantly offensive to the central religious beliefs of believing

students, and is widely known to be so. Further evidence of its known affront to religious beliefs is manifested by the fact of the incorporation of an excusal policy in the initial proposal for reasons of parental grounds of conscience, whereby the State, by so attempting to wash away the stain of its own hindering of the Free Exercise of Religion, admits the immoral nature of the program. Because the State has included the excusal policy for reasons of conscience, according to Yoder it must show an interest of sufficient magnitude to override the claim of First Amendment violation — in the absence of proof that the requirement does not deny such right. The State Board's position has been that it does not violate that right because of the excusal policy which was upheld by the Supreme Court of New Jersey, which holding is erroneous and incomplete in that it depends solely on the excusal clause being dispositive of the issue of indirect coercion and makes no attempt to discuss the balancing standard as required by Yoder. So pointed was its confidence in the decisions of the other State Courts being a complete rebuttal to the point that the Court stated that the reasonings of appellants' on the matter was not included in the decision. (A6a).

Let us consider, then, the circumstances of the two decisions of the State Courts of Hawaii and California and see whether such reliance on them has that quality of certainty as to preclude the applicability of the balancing criterion of the Yoder case. The Medeiros case (*Medeiros v. Kiyosaki*, 52 *Ha* 436, 478 P 2d 314 (1970) was decided prior to the Yoder case and was made on the basis that because of the excusal clause there is no direct governmental compulsion involved. It rejected the indirect pressure on students to attend such courses, as was recognized in the Abington case, (*Abington School District v. Schempp*), 374 *U.S.* 203, 83 S Ct. 1560, 10 L.Ed. 2d 844 (1963) but the reasoning for not applying it was not clearly set forth. It cited contradictory statements of Justices Brennan and Douglas in each of their concurring opinions on the point of whether the excusal policy ruling should also apply in Free Exercise complaints but the reasoning did not seem conclusive. This in turn became the basis for the California decision (*Citizens for Parental Rights v. San Mateo*

*County Board of Education*), C.A. 3d 1, 124 Cal. Rptr (1975) which excluded the introduction of the Yoder case into the argument by stating at 14:

> "Contrary to the contentions of the parents and amicus curiae the issues presented in Yoder did not necessarily require a trial on the merits and the case is not good authority for the contention that their amended complaint has alleged any cause of action. While it is repeatedly asserted that the program in issue here provides an interference with the free exercise of religion similar to that of Yoder, no part of the lengthy complaint specifically so alleges."

The question was finally disposed of on procedural grounds by affirmance of the county's motion to dismiss.

Thus, appellants contend that a review of the argument relative to the excusal clause will disclose weaknesses in the conclusions of the cases cited which indicate that it may be a mistake to dismiss the issue on that basis alone without regard to the Yoder requirement as to the balancing of interests. The State has not shown any overriding interest for the regulation and from the evidence and statistics submitted will certainly find itself hard pressed to do so, if required. There appears to be hardly a rational relationship to some colorable state interest let alone one of paramount importance.

In fact, all of the statistics of the Report cited in the Decision (A2a) are irrelevant to this issue and are mute evidence that the proposed program is not the proper vehicle to achieve the results desired, even if the State could show some overriding interest which, up to this point, it has not. Its interest in universal compulsory education is by no means absolute to the exclusion of subordination of all other interests.

Let us further consider the logic of the program.

How can the increases in teenage sexual activity, teenage pregnancy and venereal disease reasonably be expected to be lessened or prevented by a sex education program;

a. in which the Committee recommending it ". . . pointed out that no research studies had been found that showed a correlation between teaching about human sexuality and a reduction in teenage pregnancy or venereal disease." (A2a) and,

b. which includes the ensuring of opportunities for students to discuss the advantages of becoming sexually active at an early age. (A8a).

From the above, it not only appears that the program is inappropriate and meaningless but that it is encouraging the very mischiefs it is supposedly seeking to prevent.

B. *As to the Second Segment of the holding:*

> ". . ., to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause."

it is factually inaccurate and legally incomplete.

It is incorrect to conclude that appellants are trying to control what others may study when the record of the oral hearing before the Supreme Court of New Jersey will show that, under questioning by the Chief Justice, they had no objection to the State having an alternative program which would be elective on an individual basis but the Attorney General refused in the name of the State Board of Education.

It is legally incomplete because the Court is implying an overlapping of the two clauses but does not discuss it as a problem nor explain how the State would be violating the Establishment Clause except to cite its reasoning: (A8a)

> "The Court in Epperson, (*Epperson v. Arkansas*, 393 *U.S.* 97, 89 S Ct. 266, 216 Ed 2d 228 (1968) held that the prohibition of teaching one point of view (Evolution) because it was contrary to the religious views of

> some constituted an impermissible establishment of religion. Appellants' argument is essentially the same as the one rejected in Epperson."

In addition to the fact that Epperson did not involve the problem of an overlapping of the clauses, neither appellants' argument nor the situation is the same. In Epperson the State was attempting to prohibit the teaching of a certain point of view in education with no justification other than the religious views of some of its citizens which is a clear violation of the First Amendment. In this case the State is mandating the teaching of a completely new subject as a health measure that is a radical departure from that normally attributed to accepted health curricula in public school education; and which subject, from its very nature, denigrates religious principles thereupon resulting in widespread claims of violation of the free exercise of religion. In the instant case no other person's religious liberties is infringed upon nor is there any attempt to blot out any particular segment of scientific theories in education, nor even to keep the matter out of the curriculum — except as a statewide mandate. If the above conclusion were universally valid from the facts shown it would be impossible to succeed in asserting any such constitutional right, no matter how legitimate and compelling the circumstances might be.

Therefore, appellants contend that the interposition of the excusal policy in the instant case as a complete bar to the claim of protection under the Free Exercise of Religion Clause has not been finally established until this Court has so held and that the holding of the New Jersey Supreme Court is in error for the above stated reasons.

## POINT TWO

### THE SUPREME COURT OF NEW JERSEY ERRED IN HOLDING THAT THE ACTION OF THE BOARD IN ADOPTING THE REGULATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment states in pertinent part:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

In *Meyer v. Nebraska*, 262 *U.S.* 390, 67 L ed. 1042, 43 S. Ct. 625, (1922), relative to the liberty guaranteed in the Fourteenth Amendment it held at 399:

> "Without doubt it denotes, not merely freedom from bodily restraint but also the right of the individual to contract, . . . to marry, establish a home and bring up children, *to worship God according to the dictates of his own conscience*, . . ."
>
> (emphasis added)

Appellants are claiming that their right to the free exercise of religion is being impinged upon by the State Board of Education in mandating this Family Life Education program (N.J.A.C. 6:29-7.1) as a part of the health education curriculum in the public schools of New Jersey.

The procedural authority for the State Board's rule making power is stated in N.J.S.A. 52:14B-4 (State Administrative Procedure Act) which states in part:

> "52:14b-4. Notice and Hearing
>
> (a) Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided the agency shall:

> (1) . . . . . .
> (2) Afford all interested persons reasonable opportunity to submit data, views, or argument, *orally* or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule."
>
> (emphasis added)

On review of action of an administrative agency a court will pass on, and in a proper case grant relief or set aside, agency action, findings and conclusions which are arbitrary, capricious, or both or either, or an abuse of power or discretion. 2 Am Jur 2d, S.650, p. 504. In support of this it states in *First National Bank of Fayetteville v. Smith,* 365 F.Supp. 898 (1973) at 902:

> "(1) The appropriate standard for review is whether the defendant's action and holding are arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law."

"Arbitrary" has been defined as "without adequate determining principle" or "fixed or arrived at through an exercise of will or caprice, without consideration of adjustment with reference to principles, circumstances or significance, . . . decisive but unreasoned." in *United States v. Carmack* 329 U.S. 230, 91 L ed 209, 67 S Ct 252 (1946) note 14.

The entire group of words "arbitrary, capricious and abuse of discretion" as linked together have the same basic idea, that of being an excess of power, caprice, unreason and lack of rational basis. 2 Am Jur 2d, S. 651, p. 508.

Appellants maintain that the particular transgressions in this area committed by the State Board of Education which were not subjected to the exacting judicial scrutiny by the Court as recommended in *Environmental Defense Fund Inc. v. Ruckelshaus,* 439 F.2d 584 (1971)[*1] at 598 are:

---

[*1] "To protect these interests from administrative arbitrariness, it is necessary, but not sufficient to insist on strict judicial scrutiny of administrative action."

1. It acted in an arbitrary and capricious manner in that:

a) It accepted and adopted the program at its monthly meeting in August 1979, five months before holding the initial public hearing on the matter which evidenced an intent by that body to impose its own will on the shaping of the regulation rather than to use its judgment after hearing and considering the views of an interested public as called for in the statute.[3]

b) It depended on conjecture, belief[3] and irrelevant statistics for this new program, which is a radical departure from the accepted role normally carved out for the public schools, to achieve a result having to do with student activity outside the classroom, and freely admitting in its Committee Report that there is a lack of research studies showing ". . . a correlation between teaching about human sexuality and a reduction in teenage pregnancy or venereal disease."[4]

2. It abused its discretion in that:

a) Aside from the fact that it had made its decision in August 1979 prior to calling the witnesses in February 1980 which effectively closed the door on any meaningful opportunity by the public to be heard, it further cut down on that public's right to participate by publishing inadequate notices of the hearings. Evidence of this is in the closing paragraph of the initial notice of publication in the March 6, 1980 issue of the New Jersey Register, as stated on p. 28 of appellants' brief to the State Court:

> "Interested persons may present statements or arguments in writing relevant to the proposed action on or before March 26, 1980 to;"

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[3] At page 3 of respondents' brief in the State Court it states: (. . . at its August 8, 1979 meeting) "The State Board unanimously accepted the Committee's report and specifically adopted each of its recommendations."

[3] Page 3 of Decision

[4] Page 4 of Decision

It is apparent on the face of it that it does not comply with the requirements of the statute (N.J.S.A. 52:14B-4) in that it does not allow for oral participation and could have a chilling effect on potentially interested persons throughout the State who, upon reading that notice after March 26th, would interpret it as foreclosing their opportunity to offer their views on the matter.

b) The transcripts of the hearings show that the board members made no attempt to debate the issues among themselves or to weigh the considerations except in a very general way. The basic hearing on April 8, 1980 lasted from morning until 10:30 PM and immediately at the close of the public session voted to adopt the regulation, nine to one. No discussion is listed as to the particular benefits of the rule outweighing those harms which might ensue, as depicted by the speakers in opposition to adoption. Some of those apprehensions which were concertedly expressed were; the effect of the mandate on religious freedom, the ineffectiveness of the excusal policy in mitigating the State's hampering of religion, the absence of any solid evidence of linkage between the program and the abatement of the mischiefs it purported to correct and the problem of how the program would be exposed to the children in light of their varying degrees of sensitivity to the subject matter. None of these was addressed by any board member in any detail, if at all.

It is obvious that the Board members did not follow the administrative rules of fair play nor the State statutory requirement that it "... consider fully all written and oral submissions respecting the proposed rule.", but instead, acted arbitrarily, capriciously and in abuse of their discretion by imposing their own wills and beliefs in fashioning this rule rather than fully and objectively considering the total input. The Supreme Court of New Jersey, having evidence of all of the above before it, erred in not setting aside the Board's action on the ground that it was clearly wrong. This is corroborated in *First National Bank of Fayetteville v. Smith*, Supra at 911: (citing in Hughes Air Corp. v. Civil Aeronautics Board, 482 F2d 143 (1973)

> "However, we may set aside agency action which is arbitrary or an abuse of discretion if 'this court should be

of the opinion that (the) action was clearly wrong' . . .
We are convinced that these orders were clearly wrong and therefore they are unenforceable."

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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August 20, 1982.

(Appendices Follow)

# Appendix

# APPENDIX A

SUPREME COURT OF NEW JERSEY

A-98 September Term 1981

MARY K. SMITH, HELEN FOLEY,
and JOSEPH F. SHANAHAN,
*Appellants,*

v.

P. PAUL RICCI, President
State Board of Education
and FRED G. BURKE
Commissioner of Education,
*Respondents.*

Argued February 8, 1982

Decided May 25, 1982

On certification to the State Board of Education

Joseph F. Shanahan argued the cause for appellants

Mary Ann Burgess, Assistant Attorney General,
argued the cause for respondents (Irwin I. Kimmelman,
Attorney General of New Jersey, attorney.)

The opinion of the Court was delivered by CLIFFORD, J.

Appellants challenge a regulation of the State Board of Education (Board) that requires each local school district to develop and implement a family life education program in the public elementary and secondary curricula. *N.J.A.C.* 6:29-7.1. Appellants contend that such a program impinges upon the free exercise of their religion and constitutes an establishment of religion in violation of the United States Constitution. *U.S. Const.* amend I. They also allege that the process of adopting the regulation did not comply with the requirements of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15.

## APPENDIX A

The Board adopted the regulation on August 6, 1980. Appellants then sought review in the Appellate Division, R.2:2-3 (a) (2). Before argument was heard in the Appellate Division we certified the matter directly. 88 N.J. 471 (1981)

### I

In January 1979 the Board appointed a committee, called the Family Life Committee, to make recommendations concerning the teaching of family life and human sexuality in the public schools. Prior to that time the Board's policy toward sex education was embodied in a resolution that had been adopted in 1967. That policy recommended but did not require that local school boards develop programs for sex education. A survey by the Department of Education conducted at the Family Life Committee's request, determined that under the "recommended-but-not-required policy, only 40 per cent of the state's public school pupils were receiving sex education. See *Report of the Family Life Committee of the New Jersey State Board of Education*, August 1979 (hereinafter Report). In the Report, the Family Life Committee pointed out several sociological factors and statistics that it believed reinforced the need for sex education. Although the source of these statistics is not given, there is nothing to indicate that they are unreliable nor do appellants dispute them. The Report sets forth the following:

> in the United States one in five births is to a teenager between 15 and 19;
>
> in 1977 one million babies were born to girls between the ages of 10 and 18;
>
> in New Jersey in 1977, twelve thousand babies were born to girls between 15 and 19;
>
> of the teenagers who do become pregnant when in school, about 80% drop out and do not return to complete their education;

## APPENDIX A

research studies continue to show that babies born to adolescent mothers are more apt to be premature and underweight;

babies of low birth weight often suffer from a lag in development through their early years which affects their ability to learn in school;

the incidence of venereal disease in both males and females continues to rise.

The Committee also cited the results of a 1978 Gallup poll indicating that 77 per cent of the public and 95 per cent of the students favored sex education in the schools. However, the Committee pointed out that no research studies had been found that showed a correlation between teaching about human sexuality and a reduction in teenage pregnancy or venereal disease.

The Committee then made the following recommendations:

that the study of family life education as part of the sequential comprehensive kindergarten through twelfth grade curriculum be required;

that the State Board's regulation provide for an excusal policy from sections of the curriculum dealing directly with sex education on parental grounds of conscience;

that the districts provide appropriate services to assist teenagers and teenage parents;

that the Department of Education be directed to prepare for consideration of the board, administrative code regulations to implement the above recommendations.

(Report, supra at 8-10.)

## APPENDIX A

Thereafter, the Commissioner of Education submitted a proposed regulation to the Board, which considered it at its February 6, 1980 meeting. At this meeting members of the public offered comments, both for and against the proposed regulations. The Board then approved the publication of the proposed regulation. The regulation, along with an invitation for comment, was published in the March 1980 New Jersey Register, 12 N.J.R. 105 (1980).

At its April 8, 1980 meeting the Board again heard extensive public comment on the proposed regulation. Although a variety of objections were raised, the common theme of those opposed to the family life education program was the fear that it would destroy the prerogative of parents to educate their children on matters involving sexual morality, and would inculcate in pupils concepts and attitudes, especially as related to sexuality, that conflict with their parents' views. Those in favor of the program stressed the need for young people to receive information about family life and sexuality, and saw the program as supplementing rather than replacing parental and religious efforts in this area. At the conclusion of this meeting the Board adopted the regulation by a vote of nine to one.

Less than a month later the New Jersey Senate passed a resolution directing the Board to reconsider the Family Life Education regulation. See Senate Resolution No. 24 (May 1, 1980). In response, The Board reviewed the regulation and made some changes at its meeting on June 11, 1980. The revised regulation was published in the July New Jersey Register, *12 N.J.R.* 388 (1980), and was adopted at the August 6, 1980 meeting.

The regulation required each local district to institute, by September 1981, a policy that would begin the development of a family life education program. The local programs were to be developed through consultation with and participation of teachers, administrators, parents, pupils in grades nine through twelve, physicians, members of the clergy, and other community members. *N.J.A.C.* 6:29-7.1 (b). Each year the district must give parents an outline of the curriculum and a list of instructional material, and must permit parents to review all the materials

## APPENDIX A

prior to their use in the classroom. The regulation also listed the teaching staff members authorized to teach in the program and provided for in-service preparation for those teachers. It also permitted districts to use "resource people", such as physicians, clergymen, attorneys, and psychologists, to assist with the program's development, and required the Department of Education to give technical assistance to local districts in developing their programs.

The regulation devotes one paragraph to defining "family life education programs." It says:

> (a) as used in this subchapter, "family life education program" means instruction to develop an understanding of the physical, mental, emotional, social, economic, and psychological aspects of interpersonal relationships; the physiological, and cultural foundations of human development, sexuality, and reproduction, at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community.
>
> [*N.J.A.C.* 6:29.7.1 (a)]

As part of its technical assistance to districts, the Department of Education has provided the districts with curriculum guidelines that clarify the above definition. These guidelines indicate that although the emphasis of the program is on teaching about human sexuality, that is not its only focus. Other areas of study include such topics as "Family Structure," "Growing Up Emotionally," and "Dating." Although a wide range of physical, psychological, and social phenomena are suggested as appropriate areas of study, the final decision as to what specific topics are appropriate for each district is left to that district. However, local districts must provide a program that satisfies the definition of family life education as given in the regulation.

## APPENDIX A

Finally, the regulation includes an "Excusal clause," which states:

> (i) The local board of education shall establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his/her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.
>
> (*N.J.S.A.* 18A:35-4-6 *et seq.*)
> (*N.J.A.C.* 6:29.7.1 (i)[1])

Under the excusal policy a pupil will receive instruction in all aspects of the family life education program unless a parent or guardian objects. In such a case, the pupil will be excused, but only from those parts of the program that the parent finds morally, conscientiously, or religiously objectionable.

### II

Appellants' principal objection to the regulation is that it violates both the Free Exercise and Establishment clauses of the First Amendment.

#### Free Exercise Clause

Appellants assert that by teaching about reproduction, sexuality, and the development of personal and social values, the schools will "inhibit the moral concepts held by those students who have received them through their Judeo-Christian and other home teaching." As a result, children will be exposed to attitudes, goals, and values that are contrary to their own and to those of their parents, and will thereby be inhibited in the practice of their religion. We do not question that this argument is sincerely made. Whether or not it is well reasoned we need not now decide, for we believe that the simple fact that parents can remove their children from any objectionable part of the program is dispositive. If the program violates a person's beliefs,

---

[1] Even if this paragraph were not included in the regulation, such an excusal policy would be required by statute, *N.J.S.A.* 18A:35-4.7, the wording of which is nearly identical to that used in the regulation.

that person is not required to participate. Where there is no compulsion to participate in this program, there can be no infringement upon appellants' rights freely to exercise their relgion. See *Madeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 3124 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Ed.*, 51 *Cal. App. 3d 1, 124 Cal Rptr.* 68 (Ct. App. 1975), appeal dismissed, 425 *U.S.* 908, 46 *L.Ed.* 2d 759 (1976); *Hopkins v. Hamden Board of Education*, 289 *A.2d* 914 (Conn. Ct. Com. Pls. 1970), appeal dismissed, 305 *A2d* 536 (1973).

Even though the program permits excusal, appellants argue that it nonetheless inhibits the free exercise of their religion. They assert that requiring pupils affirmatively to assert their objection to the program in front of teachers and peers exerts an intolerable pressure on those pupils such that they may be compelled to abandon their beliefs and to choose not to exercise their option to be excused. Relying on *School District of Abington Township v. Schempp*, 374 U.S. 203, 10 *L.Ed.* 2d 844 (1963), they argue that such pressure is constitutionally unacceptable.

We do not doubt that the exercise of the right to be excluded may be difficult for some. The constitution does not guarantee, however, that the exercise of religion will be without difficulty. The Supreme Court repeatedly has upheld neutral laws of general applicability even though such laws have somehow burdened the exercise of some religions. See, e.g., *United States v. Lee*, U.S. , 71 *L.Ed.* 2d 127 (1982) (social security taxes); *Gillette v. United States*, 401 *U.S.* 437, 28 *L.Ed.* 2d 168 (1971) (selective service laws); *Braunfeld v. Brown*, 366 U.S. 599, 6 *L.Ed.* 2d 563 (1961) (Sunday closing laws); *Prince v. Massachusetts*, 321 U.S. 158, 88 *L.Ed.* 645 (1943) (child labor laws); *Reynolds v. United States*, 98 U.S. 145, 25 *L.Ed.* 244 (1879) (polygamy laws).

Appellants' reliance upon Schempp is misplaced. What the Court said in *Schempp* was that an excusal policy would not save the challenged program (Bible reading in school) from a claim of unconstitutionality under the Establishment Clause, 344 *U.S.* at 224-25, 10 *L.Ed.* 2d at 859. That holding lends no support to appellants' contentions that a family life education program that

allows for conscientious excusal will coerce or cajole pupils into abandoning the exercise of their religion.

Courts in at least two states have addressed the validity of sex education curricula in light of free exercise considerations. In both instances the courts held that where there was adequate provision for excusal on the grounds of conscientiously-held belief, sex education or family life education programs did not offend the Free Exercise Clause. The Supreme Court of Hawaii specifically rejected a *Schempp*-based coercion argument in *Madeiros v. Kiyosaki*, supra, 52 *Haw.* at , 478 *P.2d* at 318, holding that where excusal was permitted, no government compulsion inhibiting religion existed. The California Court of Appeals has also rejected appellants' argument that coercion exists despite an excusal policy. *Citizens for Parental Rights v. San Mateo County Bd. of Ed.*, supra, 151 *Cal. App.* 3d at 17-18, 124 *Cal. Rptr.* at 81-82.

Indeed, both the Hawaii and California courts pointed out that accepting the argument that public schools may not offer curricula that offend the religious or moral views of a particular group would be tantamount to enshrining that group's views as state policy, thereby violating the Establishment Clause. *Madeiros v. Kiyosaki, supra,* 52 *Haw.* at , 478 *P.2d* at 318-19; *Citizens for Parental Rights v. San Mateo County Bd. of Ed., supra,* 51 *Cal. App.* 3d at 18, 124 *Cal Rptr.* at 82. In *Epperson v. Arkansas*, 393 U.S. 97, 21 *L.Ed.* 2d 228 (1968) the Supreme Court said, "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 106, 21 *L.Ed.* 2d at 235. The Court in *Epperson* held that the prohibition of teaching one point of view (evolution) because it was contrary to the religious views of some constituted an impermissible establishment of religion. Appellants' argument is essentially the same as the one rejected in *Epperson.*

Thus, appellants' argument based on the Free Exercise Clause is flawed in two ways. First, the regulation, because of the excusal clause, does not inhibit the free exercise of religion.

## APPENDIX A

Second, to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause.

### Establishment Clause

Appellants contend that the regulation violates the Establishment Clause in that the family life education program will establish secularism (or "Secular Humanism") as a religion and inhibit all traditional religions to the point of establishing secularism as a religion. Appellants' argument focuses on a single part of the *Lemon* tripartite test (*Lemon v. Kurtzman*, 403 *U.S.* 602, 29 *L.Ed.* 2d 745 (1971) that the Supreme Court has articulated for identifying the boundaries between church and state. In order to withstand constitutional scrutiny the challenged regulation must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not create excessive government entanglement with religion. *Stone v. Graham* 449 *U.S.* 39, 66 *L.Ed.2d* 199 (1980); *Lemon v. Kurtzman*, supra, 403 *U.S.* at 612-13, 29 *L.Ed.* 2d at 755; See *Marsa v. Wernick*, 86 N.J. 232, 241 (1981).

Appellants do not contend that the regulation is nonsecular; their argument assumes its secularity. Nor do they present a valid argument that the regulation fosters excessive government entanglement with religion.[2] The gravamen of their Establishment Clause argument is that the regulation, because it is secular, will in its primary effect inhibit religion.

This argument is unpersuasive. There is absolutely nothing in the regulation or in the curriculum guidelines that gives even the slightest indication that the program favors a "secular" view of its subject matter over a "religious" one. The program is, as it must be, neither antagonistic toward religion nor supportive of

---

[2] Appellants only "excessive entanglement" argument — that because the regulation permits consultation with members of the clergy in developing the program it fosters excess-entanglement — is clearly without merit.

Indeed, although we need not decide the issue here, it appears that if members of the community in general are being consulted, members of the clergy could not be excluded without violating their right of free exercise of religion. See *McDaniel v. Paty*, 435 *U.S.* 618, 55 *L.Ed.* 2d 593 (1978) (holding unconstitutional a Tennessee statute that prohibited members of the clergy from serving in the legislature).

non-religion. The mention of religion in the classroom is not forbidden. Indeed, it might be entirely appropriate in the context of discussing sexuality for a teacher to mention that different religions have different views as to the morality of certain aspects of sexual behavior and to encourage aspects of sexual behavior and to encourage the students to seek guidance from their parents and clergymen. As one writer has stated,

> As long as the state does not unfairly represent any moral views that might undercut the teaching of a child's religion, sex is as unobjectionable a classroom subject as lyric passages from the Bible. Further, such a course need not be "dehumanizing," or constitute a "religion of secularism". Competing moral interpretations of sex may still be discussed, provided that one particlar interpretation is not stressed to the exclusion of others.
>
> (Comment, *Sex Education: The Constitutional Limits of State Compulsion*, 48 *S. Cal.L.Rev.* 548, 563 (1970) (footnotes omitted).)

The regulation is barren of any requirement that a point of view, be it secular or religious, must be stressed to the exclusion of others. We therefore hold that this program does not contravene any of the three requirements of the *Lemon* test and does not constitute an establishment of religion.

III

Appellants argue that the Board's action in adopting *N.J.A.C.* 6:29-7.1 violates the Due Process Clause of the Fourteenth Amendment because the Board did not show a reasonable relationship between the goals of the family life education program and the means adopted.

The Board, on the other hand, maintains that the Family Life Committee Report, as well as the testimony of knowledgeable people such as the Commissioner of the Department of Health and the Commissioner of Human Services, supports the view that not only is there a relationship between the program and the reduction of teenage pregnancy, venereal disease, and other

social problems, but also the program is necessary if these problems are to be ameliorated.

It is well established that a presumption of reasonableness attaches to the actions of an administrative agency and that the burden of proving unreasonableness falls upon those who challenge the validity of the action. *In re Public Hearings on the Amended Determination of the Commuter Operating Agency for Fiscal Year 1975-76*, 142 *N.J. Super.* 136, 156 (App. Div.), certif. den., 72 *N.J.* 457 (1976). Appellants have offered no evidence to meet that burden but instead merely assert that there are no data that prove that the program will have any effect on the societal ills that it attacks. This bare assertion does not satisfy appellants' burden of proving that the regulation is unreasonable.

In addition, the record reveals a sufficient factual basis for the Board's conclusion that the family life educatin program is a reasonable, desirable, and necessary method of dealing with readily identifiable educational and social problems. If the Board were required to prove the efficacy of each curricular program before implementing it, the Board's ability to operate would be severely and unnecessarily encumbered. No such proof is required.

IV

Appellants have argued that the process followed by the Board in adopting the regulation was procedurally unsound. After a careful study of the record we conclude that those procedures were in accord with both the letter and the spirit of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -15. We find no procedural irregularity.

We have also carefully considered appellants' argument that the Legislature's grant of rulemaking power to the Board was illegal because it lacked adequate standards. We find that argument to be without merit.

The action of the State Board of Education is:

Affirmed.

Chief Justice Wilentz and Justices Pashman, Schreiber, Handler, Pollock and O'Hern join in this opinion.

# APPENDIX B

## SUBCHAPTER 7. FAMILY LIFE EDUCATION PROGRAM

### Authority

Unless otherwise expressly noted, all provisions of this subchapter were adopted pursuant to authority of N.J.S.A. 18A:4-15, 18A:33-1, 18A:35-5, 18A:35-6 and 18A:35-7 and were filed and became effective on April 17, 1980, or as otherwise stated in these rules as R. 1980 d.164. Sec. 12 N.J.R. 105 (b), 12 N.J.R. 251 (b). Amendments were filed and became effective on August 7, 1980 as R. 1980 d. 353. See: N.J.R. 388 (c), 12 N.J.R. 505 (c).

Executive Order 66 (1978) Expiration Date
This subchapter shall expire on
April 1, 1985.

### 6:29-7.1 Family life education

(a) As used in this subchapter, "family life education program" means instruction to develop an understanding of the physical, mental, emotional, social, economic, and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality, and reproduction, at various stages or growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community.

(b) The family life education curriculum shall be developed through appropriate consultation and participation of teachers, school administrators, parents and guardians, pupils in grades 9 through 12, community members, physicians, members of the clergy and representative members of the community. The local school district shall demonstrate prior to the initiation of any

local school district program that the above consultation and participation have taken place. The process of consultation shall be continued as the program is revised in future years.

1. The parents and guardians of pupils enrolled in the district shall receive annually an outline of the curriculum and a list of instructional materials for the grade of their child including notification about how to receive a copy of the curriculum. The district shall make available for review in each school the complete curriculum and all instructional materials prior to use in the classroom. Upon the request of parents and guardians, the material shall be made available for their review.

(c) The district's family life education program shall be implemented comprehensively through the coordinate sequential elementary curriculum with instructional units appropriate to the age, growth and development, and maturity of the pupils.

(d) Districts that develop their program with an interdisciplinary approach may use teachers from other disciplines to assist those staff members authorized to give instruction in family life education.

(e) Teaching staff members holding one of the following certificates are authorized to teach in the district's family life education program.

1. Biology;
2. Comprehensive science;
3. Elementary;
4. Health education;
5. Health and physical education;
6. Home economics;
7. Nursery;
8. School Nurse;
9. Teacher of psychology.

(f) Districts may use resource people to assist with their program; that is, physicians, members of the clergy, attorneys, parents and guardians, school social workers, school

psychologists, law enforcement personnel, and others as necessary.

(g) The local school district shall provide for in-service education to those teachers responsible for family life education programs.

(h) The State Department of Education shall provide technical assistance to local school districts in the development of family life education programs.

(i) The local board of education shall establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his/her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or gradutaion shall result therefrom, (N.J.S.A. 18A:35-4.6 et seq.).

(j) Each district board of education shall adopt a policy by September, 1981, for the development of a family life education program in the local district. The implementation of the family life education program shall be completed by September, 1983.

(k) This subchapter is subject to all of the provisions of N.J.A.C. 6:8-4.2.

## APPENDIX C

### ARTICLE 3. COMPULSORY EDUCATION

### A. ATTENDANCE REQUIRED

18A:38-25. Attendance required of children between six and 16; exceptions

Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instructions elsewhere than at school.

## APPENDIX D

18A:38-31. Violations of article by parents or guardians; penalties

A parent, guardian or other person having charge and control of a child between the ages of six and 16 years, who shall fail to comply with any of the provisions of this article relating to his duties, shall be deemed to be a disorderly and shall be subject to a fine of not more than $25.00 for a first offense and not more than $100 for each subsequent offense, in the discretion of the court.

In any such proceeding, the summons issuing therein, or in special circumstances a warrant, shall be directed to the alleged disorderly person and the child.

# APPENDIX E

## REPORT OF THE FAMILY LIFE COMMITTEE OF THE NEW JERSEY STATE BOARD OF EDUCATION

August 1979

Chairperson: Susan M. Wilson

Members: S. David Brandt
William Colon
Sonia B. Ruby
Timonthy Weeks
Robert J. Wolfenbarger
Andrew Fastow, Student Representative

# APPENDIX E

## NEW JERSEY
## STATE BOARD OF EDUCATION
## MONTHLY MEETING

**February 6, 1980**

New Jersey State Library
West State Street
Trenton, New Jersey
10:00 a.m.

| | |
|---|---|
| Presiding: | P. Paul Ricci, President |
| Secretary: | Fred G. Burke, Commissioner |
| Present: | Jack Bagan<br>S. David Brandt<br>Anne S. Dillman<br>Ruth H. Mancuso<br>E. Constance Montgomery<br>Katherine Neuberger<br>Sonia B. Ruby<br>Timonthy Weeks<br>Susan N. Wilson<br>Robert J. Wolfenbarger |
| Absent: | William Colon<br>T. Edward Hollander<br>Jack Slater |
| In Attendance: | Catherine Havrilesky<br>Assistant Commissioner<br>James Leck, President<br>Student Guest<br>Ben Geschwind, Student<br>Harry Luna, Student |

**Recommendations**—(Taken from Pages 7, 8 and 9 of the report)

# APPENDIX E

The Committee believes the State Board of Education should revise and expand its policy on teaching sex education courses in public schools.

Because so many children are deprived of the opportunity to receive instruction in sex education and because of increasing rates in teenage sexual activity, teenage pregnancy and venereal disease, the committee makes the following four recommendations:

***that the study of family life education as part of the sequential comprehensive k-12 health education curriculum be required.*

Rationale: The committee has selected family life education rather than sex education because it believes that children need to know more than technical information about their developing bodies and reproductive systems. Changing the name of the subject does not weaken the committee's conviction that students need to receive this technical information about human sexuality. However, the information must be appropriate to the age, growth, and development of the students. However, through family life education the committee also hopes to ensure opportunities for students to understand the responsibilities and consequences of becoming a parent, to discuss the advantages and disadvantages of becoming sexually active at an early age and to see the consequences and problems of contracting a venereal disease. The committee believes that family life education is a better, more comprehensive rubric under which to study how to weigh options, clarify decisions and develop personal and social values than is the narrower label of sex education.

Values in this context means the universal values that underly all religions and cultures and that protect and nurture civilized interpersonal relationships. These values include respect, honesty and compassion for self, and others.

***that the state regulations provide for an excusal policy from sections of the curriculum dealing directly with sex education based on parental grounds of conscience.*

## APPENDIX E

Rationale: Twelve thousand teenagers became pregnant last year in New Jersey. Medically, this is a high risk group. Low birth weights for this group far exceed the average for older mothers. Children born below 2,500 grams run increased risks in terms of physical and mental development. Teenage pregnancy remains the major cause of female dropouts nationally. While state law does not permit the exclusion of pregnant teenagers from the regular school program, for many of these students the regular program is inadequate.

Under New Jersey law, pregnant teenagers are considered handicapped and are eligible for special programs. However, few districts in the state provide either special education or support services for these students. Evidence indicates that special programs can reduce dropout rates, increase the health of mother and child and be implemented with little or no additional local expense.

***that the Department of Education be directed to prepare for consideration of the board, administrative code to implement the above recommendations.*

## APPENDIX F

(taken from page 108 of the Transcript)

ask that you not read that same prepared statement. We can read. We have all passed our basic skills requirement and it's kind or boring to have to listen to a written statement that you have presented us with. We would ask that you summarize your statement instead of reading a prepared written statement that you are giving us.

In addition, when we begin, we, as I said, we have 35 speakers, and we will call you in the order your names came in, and we will, the time limit will be three minutes. We hope you adhere to that in order to allow everyone an opportunity to speak and share their views with us.

COMMISSIONER BURKE: You have before you a proposal for Administrative Code that requires family life programs in all school districts.

In January of last year the Board formed its committee on this issue. In August the committee released its report. *These rules are based on the recommendations of the committee.*

## APPENDIX G

**IN THE SUPREME COURT OF THE STATE OF NEW JERSEY**

A-98 September Term 1981

MARY K. SMITH, JACQUELINE DONOHOE, HELEN FOLEY, PHYLLIS GIGLIO and JOSEPH F. SHANAHAN,
*Appellants,*

v.

P. PAUL RICCI, President State Board of Education and FRED G. BURKE Commissioner of Education,
*Respondents.*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Mary K. Smith, Jacqueline Donohoe, Helen Foley, Phyllis Giglio and Joseph F. Shanahan, appellants above named, hereby appeal to the Supreme Court of the United States from the final decision of the Supreme Court of the State of New Jersey, entered in this action on May 25, 1982.

This appeal is taken pursuant to 28 U.S.C.S. 1257 (2).

Joseph F. Shanahan
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1982, three copies of this Notice of Appeal were delivered to the office of Irwin I. Kimmelman, Attorney General of the State of New Jersey, Richard J. Hughes Justice Complex Trenton, N.J. 08625.

Joseph F. Shanahan

## APPENDIX H

JOSEPH F. SHANAHAN
RD 2 Box 105
Lambertville, New Jersey 08530
609-397-3158 — 201-788-1921
Attorney for Appellants

MARY K. SMITH, JACQUELINE DONOHOE,
HELEN FOLEY, PHYLLIS GIGLIO
and JOSEPH F. SHANAHAN,
*Appellants,*

v.

P. PAUL RICCI, President
State Board of Education
and FRED G. BURKE
Commissioner of Education,
*Respondents.*

---

SUPREME COURT OF NEW JERSEY
A-98 September Term 1982

Civil Action
CONSENT ORDER

---

This matter being opened by Joseph F. Shanahan, attorney for appellants and with the consent of the Attorney General of New Jersey, attorney for respondents being affixed hereto, appellants seeking to allow the withdrawal of Jacqueline Donohoe and Phyllis Giglio and the Attorney General having no objection;

It is on this day of August 1982

## APPENDIX H

ORDERED that Jacqueline Donohoe and Phyllis Giglio are eliminated as parties to the cause and all pleadings should be amended to so reflect.

Justice of Supreme Court

Consent is hereby given to above order.

Irwin I. Kimmelman
Attorney General of New Jersey

(s) Mary Ann Burgess
by Mary Ann Burgess,
Deputy Attorney General

Date: 9 August, 1982

## CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of August 1982 three copies of the Jurisdictional Statement were delivered to the office of Mary Ann Burgess, Deputy Attorney General of New Jersey, Richard J. Hughes Justice Complex Trenton, New Jersey 08625.

Joseph F. Shanahan, Esquire
Attorney for Appellants
R.D. 2 Box 105
Lambertville, N.J. 08530

No. 82-309

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

MARY K. SMITH, HELEN FOLEY and JOSEPH SHANAHAN,

*Appellants,*

*vs.*

P. PAUL RICCI, President, State Board of Education and FRED G. BURKE, Commissioner of Education,

*Appellees.*

---

**On Appeal from the Supreme Court of New Jersey**

## MOTION OF APPELLEES, PRESIDENT OF STATE BOARD OF EDUCATION AND COMMISSIONER OF EDUCATION, TO DISMISS OR TO AFFIRM

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Deputy Attorney General,
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No. 82-309

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MARY K. SMITH, HELEN FOLEY and JOSEPH SHANAHAN,

*Appellants,*

*vs.*

P. PAUL RICCI, President, State Board of Education and FRED G. BURKE, Commissioner of Education,

*Appellees.*

**On Appeal from the Supreme Court of New Jersey**

## MOTION OF APPELLEES, PRESIDENT OF STATE BOARD OF EDUCATION AND COMMISSIONER OF EDUCATION, TO DISMISS OR TO AFFIRM

Appellees, the President of the State Board of Education and the State Commissioner of Education, respectfully move to dismiss this appeal or to affirm the judgment of the Supreme Court of New Jersey, pursuant to Rule 16(1)(b), on the grounds that the appeal does not present a substantial federal question and, in part, rests on an ade-

quate non-federal basis and, pursuant to Rule 16(1)(d), on the grounds that this appeal does not raise any issues of special importance and that the judgment below is totally consistent with federal precedent and is so obviously correct as to warrant no further review by this Court.

## Statutory and Regulatory Provisions Involved

This matter directly involves two statutes which are part of the education laws of the State of New Jersey. N.J.S.A. 18A:35-5 requires each local school district to conduct, as part of its curriculum, "courses in health, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments" while N.J.S.A. 18A:35-4.7 provides:

> "Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom."

N.J.A.C. 6:29-7.1, the rule adopted by the State Board of Education implementing N.J.S.A. 18A:35-5 and consistent with the requirements of N.J.S.A. 18A:35-4.7, is set forth in Appendix B to the Jurisdictional Statement.

## Counter-Statement of the Case

This appeal challenges the facial constitutionality of an administrative rule adopted by the New Jersey State Board of Education to govern programs of Family Life Education.

This rule has its origin in the Policy on Sex Education adopted by the State Board of Education in 1967. This policy recommended, but did not require, that each local board of education include a sex education program as part of its health curriculum. In 1979, the State Board appointed a Committee of its members to fully review the effectiveness of this policy.

The Family Life Committee determined that although the Policy on Sex Education had been in effect for twelve years, pupils in only 40% of the school districts had access to courses in family life or sex education. Statistics reviewed by the committee demonstrated that:

> "the number of teenage pregnancies continues to increase each year . . .
>
> • • •
>
> "in New Jersey in 1977, twelve thousand babies were born to girls between 15 and 19; 60% of these girls were unmarried;
>
> "of the teenagers who do become pregnant when in school, about 80% drop out and do not complete their education;
>
> "research studies continue to show that babies born to adolescent mothers are more apt to be premature and underweight; babies of low birth weight often suffer from a lag in development throughout their early years which affects their ability to learn in school;

> "the incidence of veneral disease in both males and females continues to rise." (Appellees' App. A at 4a to 5a).*

In the face of such alarming statistics, the Committee concluded that the optional nature of the Policy on Sex Education was no longer acceptable. It, therefore, recommended that (1) the study of family life be required as part of the sequential health education curriculum; (2) the State regulations provide for an excusal policy from sections of the curriculum dealing directly with sex eduaction based on parental grounds of conscience; (3) districts provide appropriate services to assist pregnant teenagers and teenage parents and (4) the Department of Education prepare, for consideration by the State Board, regulatory proposals to implement the Committee's recommendation (Appellees' App. A at 8a to 10a).

At its meeting of August 8, 1979, the State Board of Education accepted the Committee's report and adopted its recommendations. Following this action a proposed rule governing Family Life Education was drafted which rule was then subjected to a full year of intensive public scrutiny and spirited public debate. The broad range of comments received by the State Board, through extensive written submissions and detailed oral statements presented during four public hearings, resulted in modifications of the original proposal and accommodations to the legitimate concerns expressed by parents, educators and other interested citizens.

The rule, in its final form, defined "family life education" as:

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* As used herein, Appellees' App. A refers to the Appendix filed by appellees in support of the present Motion to Dismiss or to Affirm.

> ". . . instruction to develop an understanding of the physical, mental, emotional, social, economic, and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality, and reproduction, at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community." N.J.A.C. 6:29-7.1

Although the rule requires each local school district to include "family life education" among its curricula offerings, it permits each district to develop its own curriculum and to determine the grade level at which family life education will be introduced in the elementary school. The rule, also, requires that parents be actively involved in the curriculum development process. More importantly, each local district is to:

> ". . . establish procedures whereby any pupil, whose parent or guardian presents to the school principal a signed statement that any part of the instruction in family life education is in conflict with his/her conscience, or sincerely held moral or religious beliefs, shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom." N.J.A.C. 6:29-7.1(i).

This excusal provision reflects the specific requirements of chapter 428, laws of 1980, N.J.S.A. 18A:35-4.7 known as the "Parents Rights to Conscience Act." Finally, although each local district must adopt a policy "for the

development of a family life education program" by September, 1981; full implementation of this program need not be completed until September, 1983.

Pursuant to N.J. Ct. R. 2:2-3(a)(2), five named individuals, all citizens and taxpayers of New Jersey, challenged the rule governing Family Life Education principally on the grounds that it violated the religious freedom guaranteed by the First Amendment of the United States Constitution. While the matter was pending unheard in the Appellate Division, the Commissioner and State Board of Education, pursuant to N.J. Ct. R. 2:12-2, moved for direct certification before the Supreme Court of New Jersey so that the cloud of a constitutional challenge to this Statewide educational program could be expeditiously resolved. Direct certification was granted on September 3, 1981. *Smith* v. *Ricci*, 88 N.J. 471 (1981).

In a decision issued May 25, 1982, the Supreme Court of New Jersey upheld the validity of the State Board rule governing Family Life Education. *Smith* v. *Ricci*, 89 N.J. 514, 446 A.2d 501 (1982) (Appellants' App. A at 1a to 11a).* The Court initially rejected appellants' argument that the rule violated the Free Exercise Clause of the First Amendment finding this argument flawed in two ways.

> "First, the regulation, because of the excusal clause, does not inhibit the free exercise of religion. Second, to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause." *Smith* v. *Ricci*, 89 N.J. at 523 (Appellants' App. A at 8a to 9a).

---

* As used herein, Appellants' App. A refers to the Appendix filed by Appellants with their Jurisdictional Statement.

The Court recognized that some pupils might find the exercise of the right to be excluded from the program of Family Life Education difficult. However, it correctly observed that the Constitution does not guarantee that the exercise of religion will be without difficulty. Indeed, the Supreme Court of New Jersey, in upholding the rule governing Family Life Education, followed the lead of this Court which has:

> ". . . repeatedly . . . upheld neutral laws of general applicability even though such laws have somehow burdened the exercise of some religions." *Smith* v. *Ricci*, 89 N.J. at 521 (Appellants' App. A at 7a).

Appellants also contended that the Family Life Education program violated the Establishment Clause of the First Amendment since it would inhibit all traditional religions to the point of establishing secularism as a religion. The Court below found this argument totally unpersuasive. It observed that "absolutely nothing in the regulation . . . gives even the slightest indication that the program favors a 'secular' view of its subject matter over a 'religious' one." *Smith* v. *Ricci*, 89 N.J. at 524 (Appellants' App. A at 9a). Since the rule is neither antagonistic toward religion nor supportive of non-religion, has a clearly secular purpose and does not foster excessive governmental entanglement with religion, the Court found that it passed constitutional muster under the tripartite test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and did not constitute an establishment of religion.

The Court below next considered appellants' argument that the State Board violated the Due Process Clause when it adopted the rule governing Family Life Education because the Board did not show a reasonable relationship

between the goals of the program and the means adopted to achieve those goals. Properly noting the heavy burden which appellants bear in challenging the reasonableness of administrative action, the Court found that they offered no evidence to meet that burden but only the "bare assertion" that no data existed which would prove that the program would have any impact on the societal ills it attacks. Indeed, in reviewing the voluminous record before it, the Court concluded that the record revealed:

> ". . . a sufficient factual basis for the Board's conclusion that the family life education program is a reasonable, desirable, and necessary method of dealing with readily identifiable educational and social problems. If the Board were required to prove the efficacy of each curricular program before implementing it, the Board's ability to operate would be severely and unnecessarily encumbered. No such proof is required."
>
> *Smith* v. *Ricci*, 89 N.J. at 525 (Appellants' App. A. at 11a).

Appellants' further arguments that the "process" followed by the State Board in adopting the rule was procedurally unsound and that the Legislature's grant of rulemaking power to the Board was illegal because it lacked adequate standards were found to be similarly lacking in merit.

Based upon the foregoing analysis, the Supreme Court of New Jersey sustained the validity of the State Board rule governing Family Life Education. On August 20, 1982, three of the appellants below filed a Notice of Appeal with the Supreme Court of New Jersey pursuant to 28 U.S.C. § 1257 (2) and thereafter filed a Jurisdictional Statement. The present motion to dismiss the ap-

peal or to affirm the judgment of the Supreme Court of New Jersey is submitted on behalf of the appellees, the President of the State Board of Education and the Commissioner of Education.

## ARGUMENT

**The judgment of the Supreme Court of New Jersey, upholding the validity of the rule governing family life education as a well reasoned educational decision of religious neutrality which appropriately accommodates the religious beliefs and practices of those within the public school system, should be affirmed since it is plainly correct or the present appeal should be dismissed since it fails to raise a substantial federal issue, does not present an issue of broad importance and does not conflict with federal precedent.**

The rule challenged in the present appeal was adopted by the State Board of Education in furtherance of its unique responsibilities to assure the provision of a "thorough and efficient" system of free public education as mandated by the Education Clause of the New Jersey Constitution. N.J. Const. (1948) Art. VIII, § 4, ¶ 1. See N.J.S.A. 18A:7A-1 *et seq.* Recognizing the importance of family life education in preparing today's pupils to function "politically, economically and socially in a democratic society", the State Board adopted this rule which requires each local board of education to include programs in family life education among its curricula offerings. N.J.S.A. 18A:7A-4. However, sensitive to the right of parents to mold the moral and religious principles of their children and consonant with the legislative mandate contained in N.J.S.A. 18A:35-4.7, the rule provides

for excusal from those portions of family life education programs which may conflict with "conscience, or sincerely held moral or religious beliefs." N.J.A.C. 6:29-7.1(i). This rule, involving as it does the content of the public school curriculum, goes to the very heart of the educational process. Its adoption represents an educational judgment implicating a particularly high degree of expertise by those State officials responsible for the soundness of the public educational system.

This Court has long recognized that "public education in our Nation is committed to the control of state and local authorities," *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) and has "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). Most recently, this Court stated that:

> ". . . courts should not 'intervene in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts. *Epperson* v. *Arkansas*, 393 U.S. at 104, 89 S.Ct. at 270." *Board of Educ., Island Trees, etc.* v. *Pico*, —— U.S. ——, 102 S.Ct. 2799, 2807 (1982).

Appellants contend, however, that intervention by this Court is warranted in the present case because the rule governing Family Life Education, on its face, inhibits the Free Exercise Clause of the First Amendment. This challenge is mounted despite the absolute religious neutrality of the rule and the inclusion therein of an excusal provision which appropriately "accommodates" the religious beliefs and practices of those within the public school system. Indeed, it is the latter excusal provision

which is the focus of appellants' present "Free Exercise" challenge. It is their contention that the rule, which requires pupils to take certain action in order to be excused from certain segments of family life education, exposes the pupil to a subtle form of societal pressure which may influence him not to opt for excusal but to abandon religious beliefs.

It is well established that "a violation of the Free Exercise Clause is predicated on coercion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). That coercion, however, must be direct. Incidental burdens, such as the social pressure which may be attributable to the proper accommodation of free exercise values, clearly do not rise to the level of a constitutional violation. See *Gillette* v. *United States*, 401 U.S. 437, 453 (1971).

The decision of the Supreme Court of New Jersey, consistent with numerous decisions of this Court, properly recognized that religiously neutral laws of general applicability are constitutionally sound notwithstanding the potential for some incidental or indirect burdening of the exercise of some religions (Appellants' App. A at 7a). Indeed, this Court recently stated:

> "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs." *United States* v. *Lee*, —— U.S. ——, 102 S.Ct. 1051, 1057 (1982).

In the present case, the State's grant of excusal from those portions of family life education deemed objectionable represents an effort toward appropriate accommodation. Appellants, dissatisfied with that effort, demand elimination of the family life program altogether. However, there

"can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson* v. *Arkansas,* 393 U.S., at 106.

The decision of the Supreme Court of New Jersey is not singular. Rather, it is entirely consistent with several prior decisions of other state supreme courts and lower federal courts all upholding, in the face of First Amendment challenges, programs of family life or sex education. See *Cornwell* v. *State Board of Education,* 314 F.Supp. 340 (D. Md. 1969), aff'd 428 F.2d 471 (4th Cir. 1970), *cert.* den. 400 U.S. 942 (1972); *Hopkins* v. *Hamden Board of Education,* 29 Conn. Sup. 397, 289 A.2d 914 (Ct. Conn. Plea. 1971); *Citizens for Parental Rights* v. *San Mateo County Board of Education,* 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Cal. Ct. App. 1975), appeal dism. 425 U.S. 908 (1976), reh. den. 425 U.S. 1000 (1976); *Medeiros* v. *Kiyosaki,* 52 Ha. 436, 478 P.2d 314 (1970). Nor do appellants raise any novel arguments in support of the contention of unconstitutionality.

In *Citizens for Parental Rights* and *Medeiros,* the complaining parents unsuccessfully asserted, as do appellants herein, that utilization of the available excusal provision would indirectly constitute compulsion in violation of the free exercise of religion. *Citizens for Parental Rights, supra,* 51 Cal. App. 3d at 17-18, 124 Cal. Rptr. at 81-82; *Medeiros, supra,* 52 Ha. at 444, 478 P.2d at 318. In ruling upon the same argument raised in this case, the Court below correctly rejected appellants' theory, holding appellants' reliance upon *Abington School District* v. *Schempp, supra,* to be misplaced.

The decision in *Schempp* recognizes that impermissible indirect compulsion can exist when a school district un-

dertakes to impose religious values upon pupils by daily compulsory bible readings at the commencement of the school day. In that context, this Court ruled that simply permitting individual pupils to absent themselves from the exercises upon parental request did not save the school program from violating the Establishment Clause. *Schempp, supra,* 374 U.S. at 224-225. By continuing the religious exercise for nonobjecting pupils, the school district was not maintaining the wall between church and state contemplated by the Constitution and the excusal of objecting pupils could not alter that impermissible fact.

The case presently before this Court involves the reverse situation. A religiously neutral program is being conducted in the public schools of New Jersey which program appellants seek to eliminate since they disagree with its content. The educational program is not invalid merely because appellants assert that a burden, minimal at best, must be borne to utilize the excusal provisions designed for the accommodation of persons who, like themselves, prefer not to permit their children to participate in this religiously neutral educational program. Whatever minimal burden appellants must endure is clearly outweighed by the State's interest in continuing its salutory program of family life education which the State Supreme Court recognized as "a reasonable, desirable, and necessary method of dealing with readily identifiable educational and social problems." (Appellants' App. A at 11a). This Court has consistently adhered to the principle that:

> ". . . courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Wisconsin* v. *Yoder,* 406 U.S. 205, 235 (1972).

That principle should be applied to this case. The broad brush elimination of an entire school program deemed reasonable and necessary by both the head of the State education agency, N.J.S.A. 18A:4-10, and the State Supreme Court is unwarranted. Individual accommodation for pupils is provided for by both regulation and statute and is all that is required by the Free Exercise Clause. Plainly, this case presents no substantial federal issue involving the First Amendment which warrants further review by this Court.

Appellants also assert a violation of the Due Process Clause of the Fourteenth Amendment. In their briefs before the State Supreme Court appellants raised two distinct due process arguments which were considered and ruled upon by that tribunal. The first involved an alleged violation of the State Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* The Court below rejected this argument finding that the State Board of Education, in adopting the rule governing Family Life Education, comported with both the letter and spirit of the Administrative Procedure Act. The appellants raise this due process argument in the present appeal. Since this issue is purely a matter of State law, that portion of appellants' appeal pursuing this issue is not within this Court's appellate jurisdiction. 28 U.S.C. § 1257(2). See *Murdock* v. *Memphis,* 87 U.S. 590, 636 (1875). Accordingly, this issue is not sufficient to support the present appeal in the absence of a substantial federal question.

In their second due process argument, appellants contend that the rule governing Family Life Education violates the Fourteenth Amendment because it is arbitrary, capricious and an abuse of discretion. This aspect of the challenge appears to center on appellants' assertion that the State Board did not show a reasonable re-

lationship between the goals of the program and the means adopted to achieve those goals.*

The rule governing family life education was adopted by the State Board of Education in furtherance of its unique responsibilities to assure the adequacy of curricula offerings in the public schools. See N.J.S.A. 18A:7A-1 *et seq.* In adopting this rule, the Board concluded that Family Life Education is a necessary component of the public school curriculum which must be available to all pupils so that they will be prepared to function "politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4. The adoption of the rule followed careful study and full and sometimes painful debate at numerous public hearings. Admittedly, it is an educational judgment which has sparked healthy debate and which has produced both ardent support and determined opposition. Clearly, it is not for this Court to substitute its judgment for that of the State Board when "intelligent and conscientious men could differ" on the wisdom of its administrative action, *United Hunters Ass'n of N. J.* v. *Adams,* 36 N.J. 288, 292 (1962), and indeed, this Court has repeatedly declined to do so. See *Epperson* v. *Arkan-*

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*Even assuming that the regulation results in some incidental, indirect burdening of the free exercise of religion which might require application of the stricter test of "compelling State interest" to appellants' due process argument, see *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963), the rule governing Family Life Education would still pass scrutiny. Appellants have not established any significant infringement of their First Amendment right while the State Board has amply demonstrated that it acted well within its delegated authority and technical expertise in requiring that course in family life education be included among the curricula offerings of the public schools. The wealth of social science data and expert testimony presented during the public hearings on this rule overwhelmingly demonstrated the need for an organized State-wide program of family life education.

*sas, supra.* Accordingly, appellants' bald assertions of the unreasonableness of the regulation must be rejected in the face of the full record demonstrating the basis for the State Board of Education's determination of the necessity for the regulation and its concomitant decision to utilize adoption of the regulation as the means for addressing those needs.

The judgment of the Supreme Court of New Jersey, which upholds the validity of the rule governing Family Life Education as a well reasoned educational decision of religious neutrality which appropriately accommodates the religious beliefs and practices of those within the public school system, should, therefore, be affirmed by this Court since it is clearly correct or the appeal herein should be dismissed since it raises no substantial federal question, presents no issue of broad public importance and demontrates no conflict with federal precedent.

## CONCLUSION

**For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.**

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
*Attorney for Appellees, P. Paul Ricci, President, State Board of Education and Fred G. Burke, Commissioner of Education,*
By: MARY ANN BURGESS,
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JAYNEE LAVECCHIA,
Deputy Attorney General,
*On the Brief.*

Dated: October 8, 1982

[APPENDIX FOLLOWS]

# APPENDIX A

**Report of The Family Life Committee of the New Jersey State Board of Education, August, 1979**

In January of this year, P. Paul Ricci, president of the State Board of Education, appointed a five-member committee to examine and recommend improvements in existing state policy on teaching sex education in the public schools. The committee's study was divided into a review of the current policy, a summary of data relating to teenage sexual activity, an examination of the lack of sex education courses and recommendations for policy changes.

The first section of the report gives a brief history of the current policy and analyzes whether it has encouraged the development of sex education courses.

The second part summarizes data examined by the committee and includes national and state statistics on teenage sexual activity, pregnancy and the incidence of venereal disease. Included in this section is information that shows shifts in traditionally held attitudes about sex education.

The third section examines the gap that exists between several adopted state goals dealing with health and the failure to provide sex education courses.

In the fourth and final section, the committee recommends that the state board replace the present optional policy and institute a new policy which would require local boards to develop courses in family life education for all students. The second request to the state board is that this policy guarantee parents and guardians the

right to have their children excused from any parts of the program which conflict with their conscience. The third recommendation explains the need for services in the schools for pregnant teenagers and teenage parents.

The current policy on sex education was adopted by the state board on January 4, 1967. The sex education policy was suspended from July 1969 to July 1970, when the Commissioner of Education placed a mortatorium on the development of new programs in sex education.

The moratorium was rescinded through legislative action allowing the development of these programs.

The 1967 resolution recommends that local boards of education develop appropriate programs in sex education. This policy of allowing local districts to develop programs contained several important principles. Among these were that

> sex education is a shared responsibility of the home, the church and the school;
>
> sex is more than the physical process and needs to be understood by relating it to the total adjustment of the individual family and social settings;
>
> sex education does not lend itself to moralizing or telling, but to the development of individual values and beliefs.

The committee reaffirms and believes these principles are as relevant and accurate today as they were when they were written. However, the committee does not accept the optional nature of the original policy because it failed to provide instruction in family life and sex education for all the students in our schools.

## *Appendix A*

The Department of Education surveyed the county offices to estimate the number of children who receive sex education instruction. The survey found that fewer than half the districts offer these courses and that only 40% of New Jersey's children and adolescents have the opportunity to study sex eduaction while in public school. The committee learned that the majority of sex education courses are offered in the middle grades or in high school while very few programs begin in the elementary grades.

The student representative's comments and analysis of this issue were particularly valuable for the committee. He pointed out that many students are formally introduced to sex education facts and concepts for the first time in their senior year of high school. By that time, he noted, many have reached their eighteenth birthday and adulthood.

The student member called for more comprehensive instruction in family life and sex education. He told the committee that the present optional policy for local boards does not encourage the development of new programs. He further stated that the policy does not lead to comprehensive programs that meet student needs for information, discussion and clarification of beliefs and values at sufficiently early ages.

### *Societal Facts and Attitudinal Changes*

The committee studied the societal changes of the last decade affecting the behavior of young people. Although most of those facts are familiar, they bear repetition when a sex education policy comes under review:

young girls mature at an earlier age than they did a decade ago;

the American family is in a state of transition; divorce rates are high; many children are raised in single-parent family settings; more mothers are working for economic and psychological reasons;

sexual activity among teenagers has increased; it has been estimated that only 20% of those who are sexually active use any form of birth control;

the number of teenage pregnancies continues to increase each year; there is mounting concern for this problem and this year Congress passed legislation to provide pilot programs for pregnant adolescents and teenage parents;

in the United States one in five births are to teenagers between 15 and 19; in 1977, the most recent year for which we found statistics, one million babies were born to girls between the ages of 10 and 18;

in New Jersey in 1977, twelve thousand babies were born to girls between 15 and 19; 60% of these girls were unmarried;

of the teenagers who do become pregnant when in school, about 80% drop out and do not return to complete their education;

research studies continue to show that babies born to adolescent mothers are more apt to be premature and underweight; babies of low birth weight often suffer from a lag in development throughout their early years which affects their ability to learn in school;

the incidence of venereal disease in both males and females continues to rise.

The committee learned that these societal phenomena have changed traditional attitudes towards teaching sex education in the public schools. A Gallup poll taken in January, 1978, showed that 77% of the public favored teaching sex education in schools, including the discussion of contraceptives. When students were polled on similar subjects, 95% of those questioned requested instruction in sex education and wanted to receive more explicit, physiological information at earlier ages than they were currently receiving it.

In a recent CBS radio poll, both parents and children agreed that sex is the topic of conversation that both groups find most difficult to discuss together. If the CBS sample holds true nationwide, one can believe the findings of a Syracuse University professor who maintains that less than 25% of children and young people learn about sex from their own parents. Most children, he believes, receive information and misinformation from their peers.

The committee attempted to discover if there were any research studies that showed a direct link between the teaching of sex education and the decline in teenage pregnancy and venereal disease rates. There were no specific longitudinal studies that proved or disproved this point. However, one study done in several newly developing nations showed a correlation between an increase in literacy and women's abilities to control their own bodies. A study from Scandinavia showed that widespread sex education results in a reduction of vio-

lent crimes and a decline in the sale of pornographic literature. Also, recent research has concluded that costs for providing care for pregnant teenagers and for babies who are born prematurely, who may grow up to suffer from learning disabilities, are very high.

*Statutory Authority and State Goals*

According to a recent opinion from the Attorney General's office, the State Board of Education has the statutory authority to change the present optional policy on teaching sex education to one that is binding on local boards.

The authority rests in NJSA 18A:35-5. The law states that:

> "Local boards are required to provide courses in health, safety and physical education . . ."

The Deputy Attorney General, in a letter to the state board president, said the state board may determine by regulation that sex education is a necessary component of health programs and may authorize local boards to offer courses as electives or, if mandatory, to permit excusal on conscience grounds. The Deputy Attorney General also advised the board that it could require local districts to adopt courses of study in accordance with course outlines developed by the Department of Education.

The committee recognized that several state educational goals adopted in NJAC 6:8-2.1(6), as part of the T&E legislation, supported its growing belief that all

children in the state should have the opportunity for instruction in sex education.

They interpreted goals number seven, eight, nine and eleven to mean the teaching of sex education in the schools should be required, if those goals were to be attained. The seventh goal stipulates that "public schools shall help every student to acquire the capacities for playing satisfying and responsible roles in family life."

The eighth state goal stipulates that "public schools shall help every pupil to acquire knowledge, habits and attitudes that promote personal and public health, both physical and mental."

The ninth state goal stipulates that "public schools shall help every pupil to acquire an understanding of ethical principles and values and the ability to apply them to his/her own life."

The eleventh state goal stipulates that "public schools shall help every pupil to develop an understanding of his/her own worth and abilities, potentialities and limitations." The committee concluded that it is the state board's responsibility to insure the achievement of these goals.

*Recommendations*

The committee believes the State Board of Education should revise and expand its policy on teaching sex education courses in public schools.

Because so many children are deprived of the opportunity to receive instruction in sex education and because of increasing rates in teenage sexual activity, teenage

pregnancy and venereal disease, the committee makes the following four recommendations:

*that the study of family life education as part of the sequential comprehensive K-12 health education curriculum be required.*

Rationale: The committee has selected family life education rather than sex education because it believes that children need to know more than technical information about their developing bodies and reproductive systems. Changing the name of the subject does not weaken the committee's conviction that students need to receive this technical information about human sexuality. However, the information must be appropriate to the age, growth, and development of the students. However through family life education the committee also hopes to ensure opportunities for students to understand the responsibilities and consequences of becoming a parent, to discuss the advantages and disadvantages of becoming sexually active at an early age and to see the consequences and problems of contracting a venereal disease. The committee believes that family life education is a better, more comprehensive rubric under which to study how to weigh options, clarify decisions and develop personal and social values than is the narrower label of sex education.

Values in this context means the universal values that underly all religions and cultures and that protect and nurture civilized interpersonal relationships. These values include respect, honesty and compassion for self, and others.

## *Appendix A*

***that the state regulations provide for an excusal policy from sections of the curriculum dealing directly with sex education based on parental grounds of conscience.***

**Rationale:** We believe that parents should have this prerogative and that their children's educational performance, grades and ability to graduate should not suffer as a consequence of their being excused from portions of the family life programs.

***that districts provide appropriate services to assist pregnant teenagers and teenage parents.***

**Rationale:** Twelve thousand teenagers became pregnant last year in New Jersey. Medically, this is a high risk group. Low birth weights for this group far exceed the average for older mothers. Children born below 2,500 grams run increased risks in terms of physical and mental development. Teenage pregnancy remains the major cause of female dropouts nationally. While state law does not permit the exclusion of pregnant teenagers from the regular school program, for many of these students the regular program is inadequate.

Under New Jersey law, pregnant teenagers are considered handicapped and are eligible for special programs. However, few districts in the state provide either special education or support services for these students. Evidence indicates that special programs can reduce dropout rates, increase the health of mother and child and be

implemented with little or no additional local expense.

***that the Department of Education be directed to prepare for consideration of the board, administrative code to implement the above recommendations.***

*Concluding Statement*

The success of any state educational policy rests ultimately with the citizens and professionals who must implement it, including Department of Education staff, local board members, local and county administrators, parents and teaching staff members. Without committed and knowledgeable adults involved at every level in the development of family life programs the benefits will be limited.

Because of the particularly delicate nature of this subject matter, the committee senses the need for giving local districts sufficient time for development. Adequate time is needed for planning for in-service programs for teachers and for acquainting parents and interested community members with the curriculum. The committee does not expect this policy to be fully implemented until September, 1981. However, if some districts can comply with it before this date, we believe that the students in these districts will be the beneficiaries.

The Department of Education has advised the committee that there is an adequate number of classroom teachers at the elementary level and health professionals at the secondary level who are certified to teach family life education. But, we are also aware that a teacher does not necessarily have to be a trained health professional to

answer students' questions on this topic. Many students choose to discuss delicate matters about sex and family life with teachers who make them feel comfortable but who may not be the health professionals. These teachers should be encouraged to make substantive contributions to the family life program.

The committee is conscious that schools in recent months have been required to teach a number of specific courses: drug education, alcohol education and rape education. However, we believe that family life education is the cornerstone for all these courses. Family life provides the context for approaching these other areas.

The committee agrees with a recent comment made by a man who is a medical doctor and the director of health services at a nearby university. When asked to comment on the plethora of mandated subjects in the health area, and particularly on the teaching of family life education in the schools, he said, "If policy-makers, administrators and teachers do a good job in planning and teaching these subjects to this generation of children, perhaps the need for such learning and teaching will disappear in the future."

The year 1979 is the International Year of the Child. It is a year when adults will not only honor children, but attend to their many pressing social, economic and educational needs.

It is with the hope that we are attending to the educational needs of the children and young people of New Jersey that the committee asks the state board to adopt a new policy—one that requires the teaching of family life education in the public schools.

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